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Supreme Court, U.S.
FILED

CASE NO.: 94 1579 MAR 20 1995

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

The People &c. ex rel.
Charles E. Collins, III,
on behalf of
Charles Shufelt,
Petitioner,

v.

W. Dennis Duggan,
Respondent.

ON WRIT OF CERTIORARI TO
THE NEW YORK STATE
COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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5 cy Pet

QUESTIONS PRESENTED FOR REVIEW

1. Is failure to pay child support pursuant to a court order a "crime" pursuant to state statute?

2. Does New York State Family Court Act § 433 violate a respondent's constitutional right to a public trial when imprisonment is a possibility on its face and/or as it is being applied?

3. Does New York State Family Court Act § 435 violate a respondent's constitutional right to a jury trial when the potential punishment exceeds six months in jail or a $5,000.00 fine or both

4. Does New York State Family Court Act § 439 violate a respondent's constitutional right to have a judge hold a trial to determine guilt or innocense?

5. Should the Writ of Habeus Corpus been denied when respondent was tried, convicted and sentenced to jail in a secret court proceeding?

LIST OF ALL PARTIES

I certify that the following comprise all interested persons known to Petitioner:

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o/b/o
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Respondent

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Charles E. Collins +
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OFFICIAL COURT OPINIONS

The New York State Supreme Court, Appellate Division, Third Department Ordered denied Mr Collins' Petition for Writ of Habeus Corpus dated November 8, 1994 on December 14, 1994.

The New York State Court of Appeals affirmed the Supreme Court, Appellate Division, Third Department's Decision and Order on February 16, 1995, Mo. No. 232 SSD 9

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari sought from the final Order of the New York State Court of Appeals issued February 16, 1995 (Mo. No. 232 SSD 9) and is herein filed within the thirty (30) day requirement.

The United States Supreme Court has jurisdiction pursuant to 28 U.S.C. Section 1257.

The New York State Court of Appeals had jurisdiction pursunat to New York State Constitution, Art. VI, § 3 subd. b, par. [2] and Civil Practice Law and Rules § 5601 [b] and [d].

The Appellate Court had jurisdiction pursuant to Civil Practice Law and Rules § 7002 (b).

Charles E. Collins, III
Petitioner - Pro se

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, Article VI, Section 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militias, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprive of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial by an impartial jury of the State and district wherein the crime shall have

been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

This is an appeal from the final Order dated February 16, 1995 by Chief Judge Judith Kaye of the New York State Court of Appeals dismissing Mr Charles E. Collins' appeal of the dismissal of a Writ of Habeus Corpus sua sponte upon the ground that no substantial constitutional question is directly involved.

FACTS

Mr Charles Shufelt was tried and convicted of contempt of court for failure to pay child support pursuant to a court order by a person who is not a judge in a secret court proceeding and was imprisoned by a judge in a secret court proceeding and was denied his constitutional rights to a public trial and a jury trial.

On August 30, 1994 Hearing Examiner Mary Elizabeth Dunne issued an Order finding that Mr Shufelt had willfully violated a Family Court Order of support. She then issued a judgment in the amount of $9,037.15 against Mr Shufelt for the vila-

tion and transferred the proceeding to the Family Court Judge who sentenced him to sixteen weekends in the Albany County Jail.

The Appellate Court denied Mr Shufelt a stay of the Commitment Order. Mr Collins filed a writ of habeus corpus pursuant to CPLR § 7002 (b) and documented that Mr Shufelt was denied his right to public trial, jury trial and a judge to determine his guilt or innocense. The Appellate Court summarily denied the writ of habeus corpus even though the statute requires the writ to be issued pursuant to CPLR § 7003.

Mr Collins then appealed to the New York State Court of Appeals which denied the appeal on the grounds that no substantial constitutional question was involved.

Certainly, Mr Shufelt's constitutional right to a public trial before being imprisoned is a substantial right along with his constitutional right to a jury trial.

ARGUMENTS

Mr Shufelt had a constitutional right to a public trial and a jury trial before he was imprisoned which was denied pursuant to Family Court Act §§ 454 and 435.

Family Court Act § 433 is unconstitutional on its face and/or as it is being applied as it deprived Mr Shufelt of a public trial.

That the Family Court in the Matter of Linda G. v. Theodore G., 74 Misc.2d 516, 345 N.Y.S.2d 361 at 366 (Fam. Ct. 1973) held that failure to pay support pursuant to court order was a "crime" under County Law § 722(a) stating:

> . . . In this matter, it is; the respondent-husband clearly, at some stage of the proceeding, is **liable to a loss of his liberty**. We respectfully believe that the clear intent of the Appellate Division to ever widen the availability of counsel must also be construed and/or effectuated as a mandate to lower Courts to extend the most liberal construction, consistent with its written terms, to (County Law) Article 18-B. Accordingly, although the statute by its terms (County Law Section 722) is framed to encompass persons "accused of crime",

Section 722-a, **defines a crime as "a felony, misdemeanor, or the breach of any law of this state** . . . other than one that defines a 'traffic infraction', for which a sentence for a term of imprisonment is authorized upon conviction thereof". **Under this definition, incarceration for violation of a support order is not excluded under the statute's only exclusionary clause**, viz. that of a "traffic infraction".

That under the New York State Penal Law failure to pay support is an offense and as the potential sentence can exceed 15 days is considered a misdemeanor.

Penal Law Article 10 - Definitions:

1. "Offense" **means conduct for which a sentence to a term of imprisonment or a fine is provided by any law of this state or by any law**, local law or ordinance of a political subdivision of this state, **or by any order**, rule or regulation of any governmental instrumentality authorized by law to adopt the same.

4. **"Misdemeanor"** means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.

5. "Felony" means any offense for which a sentence to a term of imprisonment in excess of one

year may be imposed.

6. "Crime" means any misdemeanor or a felony.

As contempt of a court order for failure to pay support is punishable by at least six months incarceration under Family Court Act § 454, it is therefore, classified as a misdemeanor and is therefore, considered a "crime".

That both the State and Federal Court have held that a person cannot be sentenced to jail in a secret trial.

In Re Rosahn, 671 F.2d 690 at 695, 696, 697 (2nd Cir. 1982):

> [9] Another argument not raised below is that the contempt proceeding was conducted in a manner **that violated her right to due process because a full adversary hearing was not held, no witnesses were called, she was not informed of her right to call witnesses, and she was not offered an opportunity to address the court before issuance of a CIVIL contempt order. . .**
>
> [10] . . . In In Re Oliver, 333 U.S. 257, 68 S.Ct. 499, (1948) which struck down a secret criminal

contempt trial as violative of due process, **the Supreme Court stressed that at the heart of due process clause is "[t]he traditional Anglo-American distrust for secret trials," which throughout history have been associated with "institutions [that] obviously symbolized a menace to liberty."** Id. at 268-69, 68 S.Ct. at 505.

"In view of this nation's historic distrust of secret proceedings [and] their inherent danger to freedom, . . . **the guarantee [of public proceedings] has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.**" Id. at 270, 273, 69 S.Ct. at 507.

The safeguard of open proceedings not only represents **"an effective restraint on possible abuse of power,"** Id. . . ., but also **reflects "the notion, deeply rooted in common law, 'that justice must satisfy the appearance of justice.'"** (Citations omitted)

While the passages quoted from In re Oliver were written primarily with criminal trials in mind, it is significant that the contempt sentence overturned by the Oliver Court on the ground that the contempt proceeding below had been improperly closed to the public was a conditional jail sentence that would have terminated upon compliance with the trial court's order. Accordingly, the Oliver analysis was applied to invalidate a contempt sanction whose central characteristic—its conditional nature—**is typical of a *civil* contempt**. . . . .

[11, 12] The government argues that whatever may be the rule in a criminal contempt trial, there is no Fifth Amendment requirement that a *civil* contempt trial pursuant to 28 U.S.C. § 1826 be held in public. We are unpersuaded by this distinction. As we noted in In re Bella, 518 F.2d 955, 958-59 (2nd Cir. 1975):

"Admittedly . . . a proceeding [under § 1826] is basically civil in nature. The purpose of holding a witness in contempt is to coerce him to answer the grand jury's questions, not to punish him for reprehensible conduct. . . . **Yet, the burden of imprisonment is just as great, regardless of what we call the order that imposed it. It is this fact that fosters the need for procedural protection.**"

Given the burden that imprisonment imposes on an individual, **a civil contempt trial that could result in an order of confinement carries with it the same concerns and purposes that lead to the requirement of a public trial in the criminal context**, such as the need to assure accountability in the exercise of judicial and governmental power, the preservation of the appearance of fairness, and the enhancement of the public's confidence in the judicial system. . . .

[13] **Our conclusion that alleged civil contemnor's, like criminal contemnor's, have some right to a public proceeding** is supported by and consistent with the trend in this and other Circuits to **afford the same or similar procedural safeguards to persons charged with civil contempt as to those charged with criminal contempt. * * * We are**

satisfied that the protection against unnecessary secret proceedings extends beyond the criminal context. [One court has held that to comport with due process requirements certain quasi-judicial administrative proceedings "that involve important constitutional rights" must "be open to the press and the public." Fitzgerald v. Hampton, 467 F.2d 755, 763, 766 [D.C.Cir. 1972])

We hold, therefore, that Rosahn's **due process rights were violated when the trial court ordered the entire contempt proceeding closed over her objection**. We need not and do not decide whether the due process clause extends the same degree of protection to civil contemnor's who do not face imprisonment.

In re Di Bella, 518 F.2d 955 (2nd Cir. 1975):

In Argersinger v. Hamlin, 407 U.S. 25, 37, 92 S.Ct. 2006, the Court held that, absent a knowing and intelligent waiver, **no person may be imprisoned for 'any' offense**, whether classified as petty, misdemeanor, or felony, unless he is represented by counsel at his trial. The Circuits with the opportunity to do so have concluded that this right must be extended to contempt proceeding, **be it civil or criminal, where the defendant is faced with the prospect of imprisonment**. See, United States v. Sun Kung Kang, 468 F.2d 1368 (9th Cir. 1972); In re Kilgo, 484 F.2d 1215 (4th Cir. 1973); Henkel v. Bradshaw, 483 F.2d 1386 (9th Cir. 1973). We agree.

United States v. Sun Kung Kang, 468 F.2d 1368 (1972):

Appellant, an indigent, had requested appointment of counsel to represent him in the civil contempt proceeding. . . .

. . . . **Threat of imprisonment is the coercion that makes a civil contempt proceeding effective. The civil label does not obscure its penal nature.** (*Cf.* Harris v. United States, (1965) 382 U.S. 162, 86 S.Ct. 352.

Argersinger v. Hamlin, 92 S.Ct. 2006 (1972) at 2008 holds:

[1] The Sixth amendment, which enumerated situations has been made applicable to the states by reason of the Fourteenth Amendment (citations omitted); and In Re Oliver, . . . , 68 S.Ct. 499, . . . , provides specified standards for "all criminal prosecutions".

One is the requirement of a "public trial". In re Oliver, supra, held that the right to a "public trial" was applicable to a state proceeding even though only a 60 day sentence was involved. . . ., 68 S.Ct., at 507.

Another guarantee is the right to be informed of the nature and cause of the accusation. Still another, the right to confrontation. Pointer v. Texas, supra. And another, compulsory process for obtaining witnesses in one's favor. Washington v. Texas, supra. We have **never** limited these rights to felonies or to lesser but serious offences.

In Washington v. Texas, supra, we said, "We have

held that due process requires that the accused have the assistance of counsel for his defense, that he be confronted with witnesses against him, and that he have a right to a speedy and **public trial.**" 388 U.S., at 18, 87 S.Ct. at 1922. Respecting the right to a speedy and public trial, the right to be informed of the nature and cause of the accusation, the right to confront and cross-examine witnesses, the right to compulsory process for obtaining witnesses, it was resently stated. **"It is simply not arguable, nor has any court ever held, that the trial of a petty offense may be held in secret**, or without notice to the accused of the charges, or that such cases the defendant has no right to confront his accusers or to compel the attendance of witnesses in his own behalf" Junker, The Right to Counsel in Misdemeanor Cases, 43 Wash.L.Rev. 685, 705 (1968).

In Re Oliver, 333 U.S. 257, 68 S.Ct. 499 (1968)

held:

[7] *First*, Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in secret in any federal, state or municipal court during the history of this country. Nor have we found any record of even one such secret trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute. **Summary trials for alleged misconduct called contempt of court have NOT been regarded as an exception to this universal rule against secret trials.**

[8] . . . , **no court in this country has ever**

before held, so far as we can find, that an accused can be tried, convicted and sent to jail, when everybody else is denied entrance to the court, except the judge and his attaches. **And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter what offense he has been charged.**

[15] Nor is there any reason suggested why "demoralization of the court's authority" would have resulted from giving the petitioner a reasonable opportunity to appear and **offer a defense in open court** to a charge of perjury or **to the charge of contempt. . . . The right to be heard in open court** before one is condemned to too valuable to be whittled away under the guise of "demoralization of the court's authority".

[16] It is **"the law of the land" that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal.** See Chambers v. Florida, 309 U.S. 227, 236, 237, 60 S.Ct. 472, 477, 84 L.Ed. 716. The petitioner was convicted without that kind of trial.

Matter of Chase, 112 Misc.2d 436, 446 N.Y.S.2d 1000 (Fam. Ct. 1982):

[1] Richmond Newspapers, Inc. v. Virginia, — U.S. —, 100 S.Ct. 2814, commands respect not only for its holding but for its jurisprudential and conceptual underpinnings. The Supreme Court

instructs that **all trials, civil and criminal, are presumptively open**, in vindication of an independant right of access of the public and the press. Indeed, Richmond, at 100 S.Ct. 2829-30, holds **"that the right to attend criminal trials is implicit in the guarantees of the First Amendment. . . .** Absent an overriding interest articulated in findings, **the trial of a criminal case must be open to the public."** . . . .

[2] The opinion of the Chief Justice and concurring opinions **demonstrate unequivocally that the historical and analytical bases for the public right of access in criminal trials pertain equally to civil proceedings. Those grounds reflect a profound Anglo-American commitment to open justice in criminal and civil proceedings.** As identified in Richmond, supra, which treats each ground comprehensively:

People v. Boyd, 59 A.D.2d 558, 397 N.Y.S.2d 150:

[2-5] The Sixth Amendment to the **United States Constitution guarantees to everyone accused of a crime "the right to a speedy and *public* trial"** (emphasis supplied). **By the Fourteenth Amendment, the States are bound to give the accused these same rights** (see, Duncan v. Louisiana, 88 S.Ct. 1444). This same right to a public trial is provided in this State by statute (see Judiciary Law ¢ 4; Civil Rights Law, § 12). **Where this fundamental right has been unjustly abridged, a new trial is mandated "without an affirmative show-**

ing prejudice" (see People v. Jelke, 308 N.Y. 56, 67, 123 N.E.2d 769). . . . . Also, the closing of the courtroom is to be done sparingly and only in unusual circumstances (See People v. Hilton, 31 N.Y.2d 71, 334 N.Y.S.2d 885).

Herald Co., Inc. v. Weisenberg, 89 A.D.2d 224, 455 N.Y.S.2d 413 (1982):

[2] Turning to the merits, it is first observed that every citizen may freely attend the sittings **of every court in this state** (Judiciary Law, § 4). That right may be asserted by the public and the press in both criminal and civil proceedings. (Cit. Omitted). It is clear, therefore, that **all judicial proceedings in this state are presumptively open to the public and the press.** This is so because public access to judicial proceedings promotes public participation in government and provides a safeguard for the integrity of the judicial process (Cit. Omitted).

[3-5] The right of attendance is not absolute, of course (Cit. omitted), and where there are **compelling** reasons for closure the right may be denied. (Cit. omitted). It is established, at least in criminal cases, that it may not be denied summarily and that the trial court **must conduct** a preliminary inquiry to determine the need for closure (Cit. omitted). . .

While the First Amendment constitutional right of attendance has thus far been insured only at criminal trials (102 S.Ct. 2613), **the Supreme Court has noted that historically both civil and criminal trials have been presumptively**

open (100 S.Ct. 2814, 2829 n. 17)

No finding was issued stating why the court was closed in violation of the Uniform Rules of New York Trial Courts § 205.4 (22 NYCRR § 205.4).

§ 205.4 Access to Family Court Proceedings

(a) In exercising the inherent and statutory discretion possessed by the judge who is presiding in the courtroom to exclude any person or the general public from a proceeding in the Family Court, the judge may consider, among other factors, whether:

Whenever the judge exercises discretion to exclude any person or the general public from a proceeding or part of a proceeding in Family Court, the judge shall make findings prior to ordering exclusion.

That Family Court Act § 435 is unconstitutional as it deprived Mr Shufelt of a jury trial.

That upon information and belief Judge Duggan relied upon Family Court Act § 454 as Family Court Act § 454 states the potential sentence that may be imposed by the Family Court.

That based upon information and belief Mr Shufelt faced the following potential sentence when

he was tried, convicted by Hearing Examiner Dunne and sentenced to jail by Judge Duggan under Family Court Act § 454 which must be imposed pursuant to Family Court Act § 454 subd. 4:

a) Under § 454(2-a) Mr Shufelt would have a judgment issued in the amount the court determines his arrears to be. That this amount would be in excess of $10,000.00

b) Under § 454(2-b) Mr Shufelt would have his income attached by the Albany County Support Collection Unit.

c) Under § 454(2-c) Mr Shufelt would be required to post a cash deposit or collateral which would equal his next three (3) years payments. Weekly support obligation $ 66.51 times 156 weeks = $ 10,375.56. (This figure does not include his percentage of day care and uncovered medical bills.

d) Under § 454(2-d) an order of sequestration would be issued against Mr Shufelt's property.

e) Under § 454(3) Mr Shufelt would have to pay his ex-wife's attorney fees which could potentially exceed $5,000.00.

f) Under § 454(3-a) Mr Shufelt could be sentenced to a jail term of six months plus he would be facing another six months in jail if he was not able to comply with items c and e above. Therefore, he faces a potential sentence of one year or more as the six months for the failing to pay

attorney fees or post a cash deposit or collateral are factually linked.

g) Under § 454(3-b) Mr Shufelt could face probation for at least the next 18 years as his youngest child by Ms Shufelt is three years old at this time and Mr Shufelt is required to support her until she is 21 under Family Court Act § 413.

That Mr Shufelt's potential sentence at the time of trial and sentencing exceeded six months in jail or a $5,000.00 fine or both.

As documented by the court orders Hearing Examiner Dunne issued a judgment against Mr Shufelt in the amount of $9,037.15 for the willful violation of the court order and Judge Duggan sentenced Mr Shufelt to sixteen weekends in the Albany County Jail. The jail time plus the judgment exceeds six months in jail or a $5,000.00 fine or both. Therefore, Mr Shufelt was entitled to a jury trial.

That Family Court Act § 435 states:

§ 435. Procedure; adjournment; confidentiality of requests.

(a) Hearings are conducted by the court without

a jury. . . .

That Family Court Act § 435 is unconstitutional on its face and as it is being applied as it deprives a litigant of a jury trial when they face a potential penalty that exceeds six months in jail or a $5,000.00 fine or both in violation of the Sixth Amendment under Family Court Act § 454.

Before the Family Court can deny a respondent a jury trial the court must first determine what the **potential maximum penalty** is for failure to pay support. Therefore, Family Court must look to Family Court Act, Article 4, § 454 which states:

> § 454. Powers of the court on violation of a support order.
>
> 1. If a respondent is brought before the court for failure to obey any lawful order of support and if, after hearing, the court is satisfied by competent proof that respondent has failed to obey any such order, the court may use **any or all** of the powers conferred upon it by this part. The court has the power to use any or all enforcement powers in every proceeding brought for violation of a court order under this part **regardless of the relief requested** in the petition.

2. Upon finding that a respondent has failed to comply with any lawful order of support:

(a) the court shall enter a money judgment under section four hundred sixty of this article; and

(b) the court may make an income deduction order for support enforcement under section fifty-two hundred forty-two of the civil practice law and rules;

(c) the court may require the respondent to post an undertaking under section four hundred seventy-one of this article.

(d) the court may make an order of sequestration under section four hundred fifty-seven of this article.

3. Upon a finding by the court that a respondent has willfully failed to obey any lawful order to support, **the court shall order** the respondent to pay counsel fees to the attorney representing petitioner pursuant to section four hundred thirty-eight of this act and may in addition to or in lieu of any or all of the powers conferred in subdivision two of this section or any other section of law;

(a) commit the respondent to jail for a term not to exceed six months. Such commitment may be served upon certain specified days as the court may direct, and the court may, at any time within the term of such sentence, revoke such suspension and commit the respondent for the remainder of the original sentence, or suspend the remainder of

such sentence. For the purposes of this subdivision, failure to pay support, as ordered, shall constitute prima facia evidence of a willful violation. **Such commitment does not prevent the court from subsequently committing the respondent for failure thereafter to comply with any such order.**

(b) place respondent on probation under such conditions as the court may determine and in accordance with the provisions of the criminal procedure law; or

Family Court Act, Article 4, § 456 - Probation

(a) No person may be put on probation under this article unless the court makes an order to that effect, either at the time of the making of an order of support or under section four hundred fifty-four. The **period of probation may continue so long as an order of support**, order of protection or order of visitation **applies to such person.**

4. The court **shall not deny any request for relief** pursuant to this section unless the facts and circumstances constituting the reasons for its determination are set forth in a written memorandum of decision.

Under part 4, the court is required to use all of these sanctions. The judge is to state why he does not impose all of the sanctions under this section.

Blanton v. City of North Las Vegas, Nev., 489

U.S. 538, 542-543, 109 S.Ct. 1289, 1292-1293 (1989)

held:

> [1] **In using the word "penalty" we do not refer solely to the maximum prison term authorized for a particular offense. A legislature's view of the seriousness of an offense also is reflected in the other penalties that it attaches to the offense.** See United States v. Jenkins, 780 F.2d 472, 474, and n. 3 (CA4), cert. denied 476 U.S. 1161, 106 S.Ct. 2283. We thus examine "whether the length of the authorized prison term for the seriousness of other punishment is enough in itself to require a jury trial." Duncan, supra, 88 S.Ct. at 1453; see also Frank, 395 U.S. at 152, 89 S.Ct. at 1507 (three years' probation is not "onerous enough to make an otherwise petty offense 'serious'"). Primary emphasis, however must be placed on the maximum authorized period of incarceration. Penalties such as probation, or a fine may engender "a significant infringement of personal freedom," id, at 151, 89 S.Ct. 1506, but they cannot approximate in severity the loss of liberty that a prison term entails. Indeed, because incarceration is an "intrinsically different" form of punishment, Muniz v. Hoffman, 422 U.S. 454, 477, 95 S.Ct. 2178, 2190 (1975), it is the most powerful indication whether an offense is "serious".
>
> [2,3] Although we did not hold in Baldwin, that an offense carrying a maximum prison term of six months or less automatically qualifies as a "petty" offense, and decline to do so today, we do find it

> appropriate to presume for purposes of the Sixth Amendment that society views such an offense as "petty". **A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where the legislature packs an offense it deems "serious" with onerous penalties that nontheless "do not puncture the 6-month incarceration line."**

Pursuant to FCA § 454 the severity of the maximum potential penalty sufficiently reflects the legislature's determination that contempt for failure to pay support pursuant to court order is a serious offense for which a jury trial would be mandated pursuant to federal standards even if the attorney fees that could be assessed were less than $5000.

United States v. ARBO, 691 F.2d 862 (1982) held:

> [1] The Supreme Court has accorded constitutional stature to the common-law rule that "petty offenses may be tried without a jury. (Citations

omitted). In determining the line between "petty" and "serious" offenses for purposes of the Sixth Amendment right to a jury trial, the **Supreme Court has more recently emphasized the maximum authorized penalty as an objective criterion of the gravity of the offense.** Craner, supra, 652 F.2d at 24. "In deciding whether an offense is 'petty,' we have sought objective criteria reflecting the seriousness with which society regards the offense . . . and **we have found the most relevant such criteria in the severity of the maximum authorized penalty.**" Baldwin v. New York, * * *, 90 S.Ct. 1886, 1887, * * * (1970) * * *. Thus, **the Court has held that offenses carrying terms in excess of six months and fines of more than $500.00 must be tried before a jury. . . .**

In ordinary criminal prosecutions, **severity of penalty authorized not penalty actually imposed** is relevant criterion in determining whether a particular offense can be classified as "petty" for purposes of determining right to a jury trial. Frank v. U.S., 89 S.Ct. 1503.

United States v. Rylander, 714 F.2d 966, 1005 (1983):

[19-22] There is a sixth amendment right to a trial by jury in serious, but not petty, criminal contempt cases. Bloom v. Illinois, . . ., 88 S.Ct. 1477, 1480, . . ., (1968). Whether a criminal contempt is serious or petty is determined by the severity of the penalty authorized. Frank v. United States, . . ., 89 S.Ct. 1503, 1505, . . ., (1969). **If the contempt is charged under a**

statute that authorizes a maximum penalty greater than $500.00 or six month's imprisonment, there is a right to a jury trial regardless of the penalty actually imposed. Muniz v. Hoffman, . . ., 95 S.Ct. 2178, 2190-91, . . . (1975). . .

U.S. v. Bencheck, 926 F.2d 1512 at 1518 (1991)

held:

[2] . . . For example. the state may not circumvent the right to a jury trial by charging someone with a serious crime like murder, and then stipulate before trial that, if convicted, the accused will receive no more than six months. Such a tactic, if tried by the state, would run up against the policy that no single offense "can be deemed 'petty' for purposes of right to trial by jury where imprisonment for more than six months is authorized" by the legislature. Baldwin, 399 U.S. at 69, 90 S.Ct. at 1888. Nor may the right to a jury trial be denied when the state files charges for petty offenses that individually do not carry a possibility of more than six months' incarceration, but carry "an [actual] aggregate potential of greater than six months' imprisonment". Haar, 708 F.2d at 1553. **Finally, the presumption announced in Blanton, allows an accused to successfully claim the right to a jury trial in that "rare situation" where the offense or offenses are serious because of "onerous penalties that nontheless 'do not puncture the 6-month incarceration line'."** . . . .

That Family Court Act § 439 is unconstitutional as the office of hearing examiner to determine

support and contempt of support issues is not authorized under the New York State Constitution, Article 6 § 13 and is a denial of due process as a non-judical employee is determining whether the litigant is guilty or innocent of the contempt charge. Whether they call it a willful violation or a guilty verdict, the litigant faces imrpisonment and Mr Shufelt spent 16 weekends in the Albany County Jail because of a hearing examiner's decision based upon the trial the hearing examiner held.

Mathiasen v. Niagara County Legislature, 484 N.Y.S.2d 197 at 400 (1984):

> [3-5] . . . When a statute affords a broader preference than granted by the constitution, it will be struck down (see, e.g., Matter of Keymer, 148 N.Y. 219, 42 N.E. 667).

AG Ship Maintenance v. Lezak, 69 N.Y.2d 1, 511 N.Y.S.2d at 218:

> Under the State Constitution the authority to regulate practice and procedures in the courts is delegated primarily to the Legislature (N.Y.

Const., art. VI, § 30). **There are some matters which are not subject to legislative control because they deal with the inherent nature of the judicial function** (see, e.g. Riglander v. Star Co., 98 App.Div. 101, 90 N.Y.S. 772, affd. 181 N.Y. 531). Generally, however, the Legislature has the power to prescribe rules of practice governing court proceedings, and any rules the courts adopt must be consistent with existing legislation and may be subsequently abrogated by statute Cohn v. Borchard Affiliations, 25 N.Y.2d 237, 303 N.Y.S.2d 633). In addition, **the court rules must be adopted in accordance with procedures prescribed by the Constitution** and statute (N.Y. Const. art. VI, § 30; Judiciary Law § 211[1][b]).

The starting point for any constitutional question must be the language of the constitution itself. People v. Carroll, 3 N.Y.2d 686, 689, 191 N.Y.S.2d 812, 814:

When the language is clear and leads to no absurd conclusion there is no occasion, and indeed, it would be improper, to search beyond the instrument for an assumed intent. 3 N.Y.2d 688, 171 N.Y.S.2d at 814.

Commissioner of Social Services v. Robert G.,

72 A.D.2d 9, 423 N.Y.S.2d 155 at 162:

> [9] **The Legislature may not constitutionally regulate the details of the manner of performance of the court's jurisdictionally mandated duties** (Riglander v. Star Co., 98 App.Div. 101, 90 N.Y.S. 772, aff'd. 181 N.Y. 531).
>
> The New York State Constitution, Article 6, § 1 creates the Family Court as part of the Unified Court System for the State of New York. Article 6, §13, subd. (a), establishes the Family Court of the State of New York. Article 6, § 13 (b) and (c), state the jurisdiction of the Family Court. Family Court Act § 113 implements these Constitutional provisions. It is well settled that Family Court is a Constitutional Court. As, such it cannot be changed or abolished without amending the State Constitution.

In enacting § 439 of the Family Court Act, the Legislature unquestionably changed Family Court by interfering with and displacing Family Court Judges. Article 6, § 13 of the New York State Constitution empowers Family Court to hear enforcement and modification petitions concerning support and custody when referred to the Family Court by the Supreme Court, paternity, among others. Section 439 of

the Family Court Act invests the Hearing Examiners with the power to grant any relief within the power of the court. Niblock v. Noblock, 181 A.D.2d 825, 581 N.y>S.2d 380 (1992).

§ 439 Hearing Examiners

> (a) . . . Except as hereinafter provided, hearing examiners shall be empowered to hear, determine and grant any relief within the powers of the court in any proceeding under this article (article 4), article 5 and five-a of this act, . . .

Thus, the Hearing Examiner, a non-judicial employee of the Unified Court System, is for all purposes a judge possessing all the powers of a Family Court Judge duly elected pursuant to Article 6, § 13(a) of the Constitution in support proceedings, USDL proceedings, proceedings involving enforcement or support orders by income executions, and the fact-finding part of contempt proceedings.

Family Court Act, Article 4, Section 439 of the Family Court Act is unconstitutional as it transfers

the powers vested in duly elected Supreme Court judges and Family Court judges to non-judicial, non-elected employees of the Unified Court System by changing the composition of the Family Court as defined by the New York State Constitution Article 6, Section 13(a) without amending the State Constitution. The State Constitution does not authorize the creation of the hearing examiner's office to determine support or violations of support. The State Constitution has specifically given that authority to the Supreme Court judges and to the Family Court when referred to it by the Supreme Court. The men and women of the State of New York have the right to have all their issues concerning support decided by a judge who is elected by them or appointed as dictated by the state constitution. They have a corollary right not to have such matters decided by a non-judicial employee of the Unified Court System chosen by the Chief Administrator, who is

himself appointed by the Chief Judge of the Court of Appeals.

The fact that the Legislature excludes certain proceedings for the Hearing Examiner's jurisdiction does not lessen its Constitutional impact. For if today the Legislature presumes to exempt disputed paternity proceedings and commitment proceedings from the Hearing Examiners preview, tomorrow it can include them. If § 439 of the Family Court Act, as it now stands, is held to be Constitutional, there is no point at which the Court can say that a Legislative amendment increasing the scope of the Hearing Examiner's authority becomes unconstitutional. If § 439 today is Constitutional, an amendment to § 439 tomorrow empowering Hearing Examiners to hear and determine all matters that a Family Court Judge can hear and determine can scarcely be held unconstitutional.

Section 439 does indeed change Family Court,

one of the high courts "embedded thoroughly in our fundamental law" — the State Constitution. Moreover, it potentially abolishes the Family Court created by the Judiciary Article by authorizing the wholesale transfer of its powers from Constitutionally elected Judges to non-judicial, non-elected employees of the Unified Court System.

Pursuant to this section a litigant is forced to have a person who is not a judge determine whether or not they committed a "criminal act" (contempt of a court order) for which the litigant can be sentenced to a term of imprisonment that exceeds six months in jail or $5000.00 fine or both.

Whether or not this is considered a "civil" or "criminal" proceeding the result is the same — Mr Shufelt has been imprisoned based upon the determinations of a person who is not a judge. In short, we have non-judicial employees of the Unified Court System determining guilt and innocence in secret

trials.

Handa v. Handa, 103 A.D.2d 794 (1984) holds **family court is a constitutional court.** The theory of the judiciary article of the constitution is to simplify the judicial system by reducing the number of high courts and to embed those retained so thoroughly in the fundamental law that they **cannot be changed or abolished without amending the state constitution**. People v Luce, 204 NY 478 (1912), Koch v. Mayor, 152 NY 72 (1897).

N.Y.S. CONST., Article 6, Section 13 states:

> §13. [Family court established; composition; election and appointment of judges; jurisdiction]
>
> a. The family court of the state of New York is hereby established. It shall consist of at **least one judge** in each county outside the city of New York and **such number of additional judges** for such counties as may be provided by law. Within the city of New York it shall **consist of such number of judges** may be provided by law. The judges of the family court within the city of New York shall be residents of such city and shall be appointed by the mayor of the city of New York for terms of ten years. The judges of the family court outside the city of New York shall be chosen

by the electors of the counties wherein they reside for terms of ten years.

The Appellate Court in Carella v. Collins, 144 A.D.2d at 78 held that FCA § 439 was Constitutional stating:

> We find without merit respondent's contention that Family Court Act § 439 is unconstitutional insofar as it authorizes the transfer of Family Court's powers from Constitutionally elected judges to non-judicial, non-elected employees of the Unified Court System. N.Y. Constitution, Article VI, § 30 vests broad powers in the Legislature to make procedural rules for the courts.

The State Appellate Court is fully aware that the composition and the jurisdiction of the Family Court **are not** dependent on the procedures the court must follow. The procedures the court must follow must conform to the composition and jurisdiction of the family court as defined by the state constitution. Vesting jurisdiction in non-judicial employees, to determine issues of support and contempt proceedings for failure to pay support pursuant to court order, and depriving supreme court judges and fam-

ily court judges of their jurisdiction **is not a procedural act.** The Legislature has no authority to deprive either the supreme court or the family court judges of their jurisdiction as defined by the state constitution.

The issues in this case are not moot as there is a likelihood that the parties will relitigate the same issues in the future as Mr Shufelt faces at least 18 more years in family court.National Iranian Oil Co. v. Mapco Intern., Inc., 983 F.2d 485, 490 (3rd Cir. 1992).

Hunt v. Murphy, 455 U.S. 478 (1982) held that if a controversy between the parties is capable of repetition the matter was not moot under the standard stated in Weinstein v. Bradford, 423 U.S. 147 (1975).

Capital News Div. of Hearst Corp. v. Lee, 139 A.D.2d 31 that where the issues involved are of

public importance and the controversy is capable of repetition the issue is not moot.

Cerniglia v. Ambach, 145 A.D.2d 893 (3 rd Dept. 1988) held that there are exceptions to the mootness doctrine where there is a significant combination of the following factors: 1) of public importance; 2) recurring; 3) likely to escapre review; 4) novel in terms of judicial review.

The questions raised in this appeal are of public importance as there are thousands of litigants being tried and sentenced to jail in secret family court proceedings each year.

The issues will be recurring as Mr Shufelt may be held in contempt again for non-payment of support.

The State Appellate Courts are refusing to address the issues of the constitutionality of Family Court Act §§ 433 and 435.

The issues are novel as there is no case law

determining the constitutionality of these state statutes.

CONCLUSIONS

The Petitioner has clearly documented that Mr Shufelt has been tried, convicted and sentenced to jail in a secret court proceeding and was also denied a jury trial even though he faced a potential sentence and the penalty that was imposed for contempt exceeded six months in jail or a $5,000.00 fine or both.

There have been substantial constitutional questions raised as to the imprisonment of Mr Shufelt. No one should be tried, convicted and sentenced to jail in a secret court proceeding, no matter what they have been charged with whether it be classified as "civil" or "criminal".

Family Court Act § 433 holding that "the court may be closed in a proper case" is vage and conclusory and is a violation

of a litigant'c constitutional right to a public trial.In a proper proceeding the litigant who faces imprisonment is entitled to a public trial and the closing of the court in in violation of this constitutional right.

Clearly, Family Court Act Sections 433, 435 and 439 should be declared unconstitutional as they deprive a litigant of their constitutional rights to a public trial, jury trial, due process and equal protection of the law.

Petitioner, Charles E. Collins, III, on behalf of Charles Shufelt prays that this Court to grant certiorari, reverse the Order of Chief Judge Judith Kaye of the New York State Court of Appeals.

Dated: March 16, 1995

Respectfully submitted

Charles E. Collins, III

APPENDIX

Exhibit	1	Order of the New York State Court of Appeals dated February 16, 1995
Exhibit	2	Order of Appellate Court dated December 14, 1994
Exhibit	3	Order of Appellate Court dated November 28, 1994
Exhibit	4	Order of Commitment dated October 7, 1994
Exhibit	5	Order of willful contempt dated August 30, 1994

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of February 1995.

Present, Hon. Judith S. Kaye, Chief Judge, presiding.

Mo. No. 232 SSD 9

The People &c. ex rel. Charles E. Collins, III, on behalf of Charles Shufelt,

Appellant,

v.

W. Dennis Duggan,

Respondent.

The Appellant having filed a notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no constitutional question is directly involved.

Donald M. Sheraw
Clerk of the Court

At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Departments, held at the Justice Building in the City of Albany, New York.

PRESENT:

HON. ANN T. MIKOLL,
Justice Presiding,
HON. D. BRUCE CREW, III,
HON. PAUL J. YESAWICH, JR.,
HON. KAREN KAY PETERS,
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CHARLES E. COLLINS, III, on Behalf of CHARLES SHUFELT,

Petitioner,

- against - ORDER #72403

W. DENNIS DUGGAN,

Respondent.

An application having been made by petitioner at a term of court in the above-entitled proceeding for writ of habeus corpus: NOW, after reading and filing the petition of Charles E. Collins, III sworn to November 8, 1994, in support of the application, and no one having

appeared in opposition thereto, and this Court having rendered a decision on 15th day of November, 1994, it is hereby

ORDERED that the application pursuant to CPLR 7002 (b) (2) for a writ of habeus corpus is hereby denied, without costs.

ENTER:

/S/ Michael J. Novack

Clerk

DATED AND ENTERED: December 14, 1994

SUPREME COURT - APPEALLATE DIVISION
THIRD JUDICIAL DEPARTMENT

NOVEMBER 28, 1994

72420-
In the Matter of
PAMULA SHUFELT,
Respondent,
v.
CHARLES A. SHUFELT,
Apellant.

WHITE, J.

Motion for stay or order of Family Court, Albany County, denied, without costs.

At a term of the Family Court of the State of New York, held in and for the County of Albany, at Albany, New York, on October 7, 1994.

PRESENT: HONORABLE W. DENNIS DUGGAN, Judge

In the Matter of a Proceeding under Article 4 of the Family Court Act

Docket # F-843-94

PAMULA SHUFELT,

Petitioner,

- against -

ORDER OF COMMITMENT

CHARLES SHUFELT,

Respondent.

The petition of Pamela Shufelt sworn to on May 6, 1994 having been filed in this Court alleging that the above-named Respondent has failed to obey the order of this Court made herein, dated December 2, 1992; and

An order having been made herein, dated May 19, 1994 adjudging the above-named Respondent to be in willful violation of said order; it is therefore

ORDERED that the above-named Respondent be and he hereby is committed to the Albany County Jail for a term of 16 consecutive weekends from Friday at 6:00 p.m. to Sunday at 6:00 p.m. commencing October 7, 1994.

NOW, THEREFORE, WE COMMAND YOU, any

Peace Officer, or the Sheriff of the County of Albany, or the Sheriff of any County wherein Respondent may be found, that you take the body of said Respondent and safely keep him in close custody in the jail of the above-named County for a period of 16 consecutive weekends.

IN WITNESS THEREOF, I, W. Dennis Duggan, a Judge of the Family Court of the State of New York, hereunto set my hand, subscribe my name and cause the Seal of the Court to be hereunto affixed.

DATE; E N T E R

_____

J.F.C.

Entered in the office of the
Clerk of the Family Court of
the State of New York, on the
7 day of October, 1994.
By:
s/ Lisa McNulty

FAMILY COURT OF THE STATE OF NEW YORK, COUNTY OF ALBANY

AT A TERM OF THE FAMILY COURT OF THE STATE OF NEW YORK, HELD IN AND FOR THE COUNTY OF ALABNY, AT ALBANY, NEW YOR, ON MAY 19, 1994

PRESENT: MARY ELIZABETH T. DUNNE
Hearing Examiner

In the Matter of a Proceeding under Article 4 of the Family Court Act

PAMULA SHUFELT,
Petitioner,

Docket No. F-0843-92-D-2

- against -

ORDER
(Entry of Money Judgment)

CHARLES SHUFELT,
Respondent.

SPECIFIC WRITTEN OBJECTIONS TO THIS ORDER MAY BE FILED WITH THIS COURT WITHIN 30 DAYS AFTER ENTRY OF THIS ORDER.

An application having been made by Petitioner for an order directing the entry of a judgment in the sum of $9,037.15, that being the amount of arrears having accrued as of October 7, 1993 because of non-payment by Respondent of sums directed to be paid by orders dated November 18, 1993 and March 8, 1994 which continued to the Orders of November 18, 1993 and December 2, 1992 of the Family Court, County of Albany, together with costs and disburse-

ments, and

The matter having duly come on to be heard before a Hearing Examiner of this Court;

NOW, after examination and inquiry into the fact and circumstances of the case and after hearing the proofs and testimony offered in relation thereto and upon the attached findings of fact; and the defaulting party not having shown good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears; it is therefore

ADJUDGED that the Respondent willfully failed to obey the order of this court in that Respondent willfully failed to pay the sum of $9,037.15, which amount the Court finds to be the arrears due and owing under said order; and it is further

ADJUDGED that the Respondent knowingly, consciously and voluntarily disregarded the obligation under a lawful court order; and it is

ORDERED that Judgment be entered in favor of the Petitioner against the Respondent in the amount of $9,037.15.

Dated: August 30, 1994

s/
Mary Elizabeth T. Dunne

Enter: Entered in the office of the
Clerk of the Family Court of the
State of New York, County of Albany
on the 30th day of Aug. 1994
William J. Person, Chief Clerk
By Robert J. Brenner